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In the Supreme Court of the United States

OCTOBER TERM, 1988

BMT COMMODITY CORP. AND
DELCA DISTRIBUTORS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States International Trade Commission's determination that imports of dried salted codfish at less than fair value had materially retarded the establishment of an industry in the United States was in accordance with law.

2. Whether that determination was supported by substantial evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 852 F.2d 1285. The opinions of the United States Court of International Trade (Pet. App. 3a-24a) are reported at 674 F. Supp. 868 and 667 F. Supp. 880. The opinion of the United States International Trade Commission (Pet. App. 25a-41a) is unofficially reported at USITC Pub. 1711.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1988. The petition for a writ of certiorari was filed on November 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Tariff Act of 1930, 19 U.S.C. 1671 *et seq.*, provides for the imposition of antidumping duties when (1) the Department of Commerce determines that a certain class or kind of foreign merchandise is being sold in the United States at less than fair value (LTFV), and (2) the United States International Trade Commission (the Commission) determines that the establishment of an industry in the United States is being materially retarded by those imports. 19 U.S.C. 1673.[1]

"Interested parties" (19 U.S.C. 1677(9)) who participate in a proceeding before the Commission may seek review of its final determination in the United States Court of International Trade (19 U.S.C. 1516a(a)(2)), and may appeal that court's decision to the United States Court of Appeals for the Federal Circuit (28 U.S.C. 1295(a)(5) (1982 & Supp. IV 1986)). A final determination by the Commission must be affirmed unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. 1516a(b)(1)(B); *Atlantic Sugar, Ltd.* v. *United States*, 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1984).

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[1] Section 1673 provides for the imposition of an additional duty:

> If –
>
> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that –
>
> (A) an industry in the United States –
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise * * *.

2. In 1984, Codfish Corporation (Codfish) filed a petition alleging that dried salted codfish were being imported into the United States from Canada at less than fair value. Petitioners BMT Commodity Corp. and Delca Distributors, Inc., are importers of such codfish. After conducting the preliminary and final investigations required by the statute,[2] the Commission determined, by a vote of four to one, that the establishment of an industry in the United States was being materially retarded by reason of LTFV imports of dried heavy salted codfish from Canada. Pet. App. 25a-41a.

At the outset, the majority found that the relevant "domestic industry" consisted exclusively of Codfish's operations in Puerto Rico. Since this "industry" had never been "established" within the meaning of 19 U.S.C. 1673d, the majority continued, the statute required the Commission to determine whether the establishment of this industry was being materially retarded (Pet. App. 29a). The majority framed the precise question before it as follows (*ibid.*):

> whether the level of activities of Codfish Corporation reflect merely the normal start-up conditions of a company entering an admittedly difficult market or

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[2] 19 U.S.C. 1673a, 1673d. During its final investigation, the Commission sent questionnaires to Codfish and to the known importers of dried salted codfish and purchasers of dried salted codfish in the domestic market. In addition, members of the Commission's staff visited Codfish's facilities, conducted interviews with purchasers in the domestic market, received information from Canadian producers of dried salted codfish, and collected information from other public and private sources. A public hearing was held before the Commission, and all persons who requested the opportunity were permitted to appear in person or through counsel. Subsequently, a staff report discussing the data gathered during the course of the final investigation was submitted to the Commission.

> whether the performance is worse than what could reasonably be expected and thus be deemed materially retarded.

Applying this standard, the majority referred to a marketing and feasibility study prepared by Codfish and the Government of Puerto Rico Economic Development Administration (FOMENTO) at the inception of Codfish's operations. The majority described that study as "a benchmark of expected performance" against which it could measure Codfish's actual performance (Pet. App. 29a-30a). Noting that there was no serious dispute that Codfish had not operated successfully, the majority concluded that the record "indicates that Codfish Corporation's performance to date is substantially poorer than that which could reasonably have been expected" (*id.* at 31a).

The Commission then addressed the contention advanced by importers and Canadian producers, including petitioners, that Codfish's operation was "inherently unviable, and could never operate profitably, regardless of LTFV imports" (Pet. App. 31a). The Commission acknowledged that Codfish's viability was relevant to the issue of material retardation, and outlined the material "elements of viability" as (*id.* at 32a):

> the ability to produce a marketable product, which is qualitatively acceptable to purchasers, and which can be sold at a price which is competitive with fairly traded imports.

Again referring to Codfish's marketing and feasibility study, the majority rejected petitioners' position on viability, finding that "the initial business plan of [Codfish] appears reasonably calculated and could have succeeded" (*ibid.*).

The majority next considered petitioners' argument that Codfish would not be able to operate as a viable business

in the future. The text of the majority opinion described this issue of future viability as relevant. Pet. App. 32a. However, citing a line of credit that Codfish had recently been granted and arrangements the company had made to purchase fish and market its products, the majority found that "given fairly traded competition from imports" Codfish could be able to "stabilize its production and sales at a level which will allow it to become established." *Id.* at 33a.

In brief footnotes, the opinion related the individual views of two members of the Commission with respect to Codfish's viability. Commissioner Eckes was described as having "focused on the viability of the domestic industry [Codfish] during the period of the investigation" and as believing that Codfish did not have to prove "future viability to obtain relief from unfair imports." Pet. App. 31a n.16. A second footnote reported that Commissioner Lodwick had focused "primarily on the viability of the domestic industry at its inception," but believed that the discussion of future viability in the text was relevant, "as it strengthens his conclusions concerning the viability of the domestic industry" (*id.* at 32a n.20).

Finally, the majority found that LTFV imports from Canada had resulted in the inability of Codfish to market its product competitively and profitably, and concluded that the establishment of an industry in the United States had been materially retarded by reason of those imports (Pet. App. 39a).

Vice Chairman Liebeler dissented (Pet. App. 39a-41a). In her view, Codfish's poor results were not attributable to LTFV imports, but rather to Puerto Rico's warm, moist climate, which she believed was unsuitable for a fish drying operation. She concluded that the establishment of the

domestic industry had not been materially retarded by LTFV imports. *Ibid.*

3. Petitioners filed an action for review in the United States Court of International Trade (CIT). That court affirmed the Commission's determination (Pet. App. 11a-24a).

The court rejected petitioners' argument that a majority of the commissioners "did not adopt 'a single, identifiable standard of law' on the issue of viability" (Pet. App. 15a (quoting Pet. CIT Reply Br. 7)). The CIT noted that none of the parties challenged "the Commission's conclusion that Codfish Corporation's viability at inception is a relevant consideration in this case" (Pet. App. 16a), and the court upheld the Commission's finding that Codfish had been viable at that point (*id.* at 16a-17a & n.5). The court expressed "some reservations" about the Commission's analysis of "future viability" (*id.* at 17a), explaining that such an approach could lead to a decision not to impose anti-dumping duties even if an industry's failure to become established were attributable to LTFV imports—a result that the court considered inconsistent with the statute (*id.* at 18a-19a). However, the CIT found that its concern with the use of a future viability standard did not justify a remand, since the Commission had not ruled against the domestic industry on the basis of future viability (*id.* at 19a). The court found that "[a]ll four commissioners concurring in the majority opinion agreed on the analysis of the relevant issue here: Codfish Corporation's viability apart from the effects of LTFV imports" and concluded that the Commission's determination was "reached in a manner in accordance with law." *Id.* at 19a-20a.

The CIT also found that the Commission's determination that Codfish was viable at its inception was supported by substantial evidence. The court determined that the

Commission had properly considered both the initial feasibility study to which the Commission's majority opinion had referred and a study, upon which petitioners relied, by the Citicorp Capital Markets Group (Pet. App. 21a). The court also analyzed and rejected petitioners' claims that deficiencies in working capital, marketing, demand, and climate made Codfish a nonviable business (*id.* at 22a-23a). The CIT concluded (*id.* at 23a):

> It is not the function of this court to "re-weigh" factors considered by the Commission; it may only consider whether the Commission's determinations are supported by substantial evidence. * * * The Commission has clearly satisfied that test.

Petitioners sought rehearing. Their motion was denied. Pet. App. 3a-10a.

4. The court of appeals affirmed on the basis of the CIT's opinion (Pet. App. 1a-2a).

ARGUMENT

The CIT's decision, which the court of appeals adopted, is correct. Moreover, the questions raised in the petition are fact-bound and have no general importance. Review by this Court is not warranted.

1. Petitioners' principal contention is that the CIT supplied a rationale for the Commission's determination concerning Codfish's viability that was not articulated by the Commission itself (Pet. 10-14). This argument has no merit, as even cursory review of the Commission's opinion demonstrates.

The majority's opinion leaves no doubt as to the legal standard applied to Codfish's viability. The opinion described the relevant "elements of viability" as "the ability to produce a marketable product, which is qualitatively acceptable to purchasers, and which can be sold at a price

which is competitive with fairly traded imports" (Pet. App. 32a). Its decisive finding on this issue was equally straightforward. Relying on a marketing and feasibility study "prepared * * * at the inception of [Codfish's] business operations" (*id.* at 29a), the Commission concluded that "the initial business plan of [Codfish] appears reasonably calculated and could have succeeded" (*id.* at 32a).

The CIT correctly described this finding as referring to "the viability of Codfish Corporation from the time of its inception" (Pet. App. 16a n.4). No other conclusion would have been consistent with the terms of the finding and the evidence on which it rested. Though described as an inference (*ibid.*), this reading of the Commission's opinion is inescapable.[3]

Petitioners' argument that the Commission majority "did not adopt a common legal standard" (Pet. 11) is groundless. Petitioners argued to the Commission that the establishment of the domestic industry had not been materially retarded because, regardless of Codfish's viability at the outset, the company would not be able to operate as a successful business even if antidumping duties were imposed on LTFV imports (Pet. App. 32a). The

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[3] It is also noteworthy that the issue of Codfish's viability was subsidiary to more fundamental standards with which petitioners take no issue in this Court. There is no dispute, therefore, that the Commission properly viewed the dispositive issue as whether the establishment of the domestic industry had been "materially retarded" (19 U.S.C. 1673(2)(B)), and correctly framed the issue presented by this standard under the circumstances of this case, which was "whether [Codfish's] performance is worse that what could reasonably be expected and thus * * * materially retarded" (Pet. App. 29a).

The law does not require the members of the Commission to agree on all particulars of the analysis leading to a result which is in accordance with the statute. See *Copperweld Corp.* v. *United States*, 682 F. Supp. 552, 559-560, 567-568 (Ct. Int'l Trade 1988).

members of the majority unanimously rejected that contention, differing only on the precise terms of their disagreement with petitioners' position. In text, the majority opinion stated that this argument was "relevant," but found that Codfish would be viable in the future (*id.* at 32a). One member of the Commission, who had focused on Codfish's viability during the period of the Commission's investigation, expressed the view that Codfish should not even have to prove "future viability" to obtain relief (*id.* at 31a). Another Commissioner, who had focused on the company's viability at inception, added that the rejection of petitioners' argument regarding future viability "strengthen[ed] his conclusions concerning the viability of the domestic industry" (*id.* at 32a n.20).[4] Regardless of these individual views, all members of the majority joined in rejecting petitioners' challenge to Codfish's viability at any point as a defense to a finding of material retardation.

The CIT expressed reservations as to whether the Commission's consideration of future viability was more favorable to petitioners than the terms of the statute permitted. However, the court found the point immaterial in view of the fact that the Commission had rejected petitioners' position in any event (Pet. App. 18a-19a). The court noted, moreover, that the Commission's factual finding that Codfish was viable in the future was supported by substantial evidence (*id.* at 23a-24a). Against this background, a remand to clarify the Commission's determination on the issue of viability would have been a meaningless act, as the court correctly concluded (*id.* at 19a-20a).

---

[4] There is nothing talismanic about the phrases "viability at inception," "future viability," and "inherent viability." They are not terms of art in this area of the law, and were used in this case only as shorthand references to arguments raised by its facts. These terms are not deserving of the emphasis petitioners would give them. See Pet. 12-13.

In short, the only divergence among the views expressed by members of the Commission and the CIT concerned the validity of an argument, introduced into the case by petitioners, which at least three members of the majority found to be unsupported by the facts and a fourth found legally irrelevant. The CIT would also have rejected it on factual grounds, but went farther and expressed doubt as to its legal correctness. The CIT properly refused to vacate the Commission's determination under these circumstances, and this type of quibble with the terms of an agency's determination does not warrant review in this Court in any event.

2. Petitioners challenge the sufficiency of the evidence supporting the Commission's factual finding that Codfish was viable (Pet. 14-18). However, the Court does not grant certiorari "to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227 (1925). See *NLRB* v. *Hendricks County Rural Elec. Membership Corp.,* 454 U.S. 170, 176 n.8 (1981). More particularly, the responsibility for reviewing a record to determine whether an agency's findings are supported by substantial evidence is primarily for the courts Congress has designated to conduct that review, here the CIT and the Federal Circuit. *Mobil Oil Corp.* v. *FPC,* 417 U.S. 283, 310 (1974); *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951). This Court intervenes in such a case only in "the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.,* 340 U.S. at 491. This is clearly not such a case.

The Tariff Act requires the CIT to apply the "substantial evidence" test to Commission findings. 19 U.S.C. 1516a(b)(1)(B). Both the CIT and the court of appeals, through its adoption of the CIT's opinion, correctly ar-

ticulated that standard with reference to a decision of this Court (Pet. App. 20a):

> "Substantial evidence" refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Electric Indus. Co. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951)).

Nothing in the petition suggests that the lower courts erred in the application of this standard, let alone in a manner sufficiently egregious to warrant this Court's attention. Though petitioners now complain that an error in the initial study of Codfish's viability is "fatal" to the Commission's conclusion (Pet. 15), they never called the CIT's attention to that alleged error, instead raising the point for the first time on appeal. Petitioners' default alone warrants denial of review on this issue. See *Singleton* v. *Wulff,* 428 U.S. 106, 120 (1976). In any event, there is no reason to believe that the Commission's determination was dependent on the figures referred to by petitioners, which relate only to Codfish's profitability during the first year of its operations, since the Commission described the feasibility study only as a "benchmark" and carefully qualified its reliance on the study's particulars (Pet. App. 29a-30a & n.11). Finally, the conclusion that petitioners would have this Court draw from the discrepancy in the study—that Codfish's promoters expected that the company would "be a losing venture from the start" (Pet. 15) but went ahead with the business anyway—is at best farfetched.

Petitioners' suggestion that the Commission gave too much weight to Codfish's initial feasibility study and too little to the Citicorp study (Pet. 16-18) is exactly the type of issue on which a reviewing court should not second-

guess an administrative agency empowered by Congress to adjudicate issues of fact. The CIT rejected petitioners' contention that the Commission had ignored the Citicorp study (Pet. App. 22a), and properly refused to go beyond satisfying itself that the record supported the Commission's conclusions. Petitioners' argument on the significance to be given to particular evidence in the record is undeserving of further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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